Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

TERRA INDUSTRIES and TERRA INTERNATIONAL, INC., Plaintiffs, vs. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., Defendant.	No. C02-4003-MWB **MEMORANDUM OPINION AND ORDER REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

I. INTRODUCTION AND BACKGROUND

A. Procedural Background

On January 16, 2002, plaintiff Terra Industries, Inc. ("Terra Industries") and Terra International, Inc. ("Terra International") (collectively "Terra" unless otherwise indicated) brought this lawsuit against its insurer, National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"). In its complaint, Terra asserts claims for breach of contract and declaratory judgment against National Union. Specifically, Terra contends that National Union has breached an excess insurance policy by failing to defend and provide coverage to Terra with respect to lawsuits against Terra by individuals who claimed to have suffered bodily injury and property damage from their exposure to an insecticide manufactured by Terra, methyl parathion. Terra also seeks declarations that National Union has an obligation under the excess insurance policy to defend Terra against the methyl parathion lawsuits and to indemnify Terra for any judgment or settlement associated with the methyl parathion lawsuits.

On June 20, 2003, National Union filed a motion for summary judgment. In its motion, National Union contends that Terra's claimed losses from the methyl parathion lawsuits do no exceed the applicable limits of the underlying insurance coverage and therefore National Union does not have an obligation to pay Terra under its excess policy. On June 23, 2003, Terra filed its motion for summary judgment. In its motion, Terra contends that under a "sunrise endorsement" in its umbrella policy with National Union it is entitled to coverage for the costs of the methyl parathion lawsuits that exceed $1,000,000.

Pursuant to the parties' requests, the court held telephonic oral arguments on the

parties' respective cross-motions for summary judgment on August 22, 2003. At the oral arguments, plaintiff Terra was represented by Andrew R. Running of Kirkland & Ellis, Chicago, Illinois, and Greg E. Williams of Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prahl, L.L.P., Sioux City, Iowa. Defendant National Union was represented by William P. Rector of Bozeman, Neighbour, Patton & Noe, Moline, Illinois.

The court turns first to a discussion of the undisputed facts as shown by the record, then to the standards applicable to motions for summary judgment and, then, to the legal analysis of whether either of the parties are entitled to summary judgment on any of the claims at issue in this litigation.

B. Factual Background

The following facts are undisputed. Terra Industries is a Maryland corporation with its principal place of business in Iowa. Terra International is a Delaware corporation with its principal place of business in Sioux City, Iowa. Terra International is authorized to transact business in Iowa. National Union is a Pennsylvania corporation with its principal place of business in New York. National Union is authorized to transact the business of insurance in Iowa.

CIGNA was Terra's primary insurance carrier for the policy years 1994 through 1998. Terra purchased a general liability policy, policy number HDOG1658755-2, for the policy period of July 1, 1994 to July 1, 1995, from Insurance Company of North America, a CIGNA company. Terra purchased a general liability policy, policy number HDOG1658941-A, for the policy period of July 1, 1995 to July 1, 1996, from Insurance Company of North America. The general liability policies that Terra purchased for the 1994-95 policy year and the 1995-96 policy year, both have a $1,000,000 limit of liability and a $1,000,000 matching deductible.

Terra purchased a general liability policy, policy number HDOG1402778-6, for the policy period of July 1, 1992 to July 1, 1993, from CIGNA. Terra purchased a general liability policy, policy number HDOG1658377-6, for the policy period of July 1, 1993 to July 1, 1994, from CIGNA. Terra purchased a general liability policy, policy number HDOG18964302, for the policy period of July 1, 1996 to July 1, 1997, from CIGNA. Terra purchased a general liability policy, policy number HDOG19315575, for the policy period of July 1, 1997 to July 1, 1998, from CIGNA. The general liability policies that Terra purchased for the 1992-93 policy year, the 1993-94 policy year, the 1996-97 policy year and the 1997-98 policy year, all have a $1,000,000 limit of liability and a $1,000,000 matching deductible. Terra purchased a Claims Made Excess Policy from Lexington Insurance Company which expired on July 1, 1997.

Terra purchased a commercial umbrella liability insurance policy, policy number BE 932 59 98, for the policy period of July 1, 1997, to July 1, 2000, from National Union ("National Union Policy"). The National Union Policy provides coverage, subject to its terms, conditions and limitations, as follows:

> We will pay on behalf of the **Insured** those sums in excess of the Retained Limit that the **Insured** becomes legally obligated to pay by reason of liability imposed by law or assumed by the **Insured** under an **Insured Contract** because of **Bodily Injury, Property Damage, Personal Injury** or **Advertising Injury** that takes place during the Policy Period and is caused by an **Occurrence** happening anywhere in the world. The amount we will pay for damages is limited as described in Insuring Agreement III, Limits of Insurance.

National Union's App. In Support Of Motion For Summary Judgment at 224.

The National Union Policy contains the following definition of Retained Limit:

> We will be liable only for that portion of damages in excess of

> the **Insured's** Retained Limit which is defined as the greater of either:
>
> 1. The total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance and the applicable limits of any other underlying insurance providing coverage to the **Insured**; or
>
> 2. The amount stated in the Declarations as Self Insured Retention as a result of any one **Occurrence** not covered by the underlying policies listed in the Schedule of Underlying Insurance nor by any other underlying insurance providing coverage to the **Insured**;
>
> and then up to an amount not exceeding the Each Occurrence Limit as stated in the Declarations.

National Union's App. In Support Of Motion For Summary Judgment at 226.

Terra purchased a "sunrise endorsement" in the National Union Policy to fill in any gaps when it changed from claims made to occurrence coverage. The sunrise endorsement provides:

> This contract will provide coverage only for those **Occurrences** happening on or between the dates January 1, 1985 and July 1, 1997 which would otherwise be covered by the terms and conditions of this contract and which had not been reported to the **Insured** or to any of the **Insured's** Insurance Carriers on or between the dates January 1, 1985 and July 1, 1997. Providing that proper payment of premium is made, as per Condition K of this contract, and relying on the fact that you have given no fraudulent statements of writings to us, this policy may not be cancelled by us.
>
> In the event of your unintentional failure to report to prior

> carriers all occurrences and claims prior to the inception date of this policy, it is understood and agreed that coverage provided by this endorsement will still apply.
>
> Solely as respects the coverage afforded by this contract the following underlying coverages and limits (known herein as the Schedule of Underlying Insurance) apply. It is understood that these limits are unimpaired.
>
> | | |
> |---|---|
> | General Liability | $1,000,000 each occurrence |
> | Products/Completed Operations Liability | $1,000,000 each occurrence |
> | Automobile Liability | $1,000,000 each occurrence |
> | Employers Liability | $1,000,000 each occurrence |
> | Aircraft Liability | $1,000,000 each occurrence |
>
> A separate General Aggregate Limit of $98,000,000 and a separate Products-Completed Operations Aggregate of $98,000,000 is applicable to coverage provided by this endorsement.
>
> All other terms and conditions of this policy remain unchanged.

Terra's App. at A-019.

Until June 20, 1999, Terra International manufactured and distributed methyl parathion, a chemical pesticide that is designed for use in open fields to control insects. Terra International manufactured and sold methyl parathion under license from Cheminova Agro A/S, the holder of the primary EPA pesticide registration. A number of individuals sued Terra, as well as another manufacturer of methyl parathion, Cheminova Agro A/S, and a distributor of methyl parathion, for bodily injury and property damage allegedly caused by exposure to methyl parathion during 1993 to 1997. The first lawsuit naming Terra as a defendant was filed in Mississippi on November 12, 1997. This lawsuit was the

first notice that Terra had of any claims involving its methyl parathion. Upon being served with the first of the methyl parathion lawsuits, Terra chose legal counsel and defended itself in the methyl parathion lawsuits. Terra notified National Union of the claims and advised it of the status of the methyl parathion lawsuits. Terra's legal counsel in the methyl parathion lawsuits summarized the allegations made by the various plaintiffs and noted that the plaintiffs alleged that they were exposed to methyl parathion from 1993 to 1997. Prior to authorizing settlement, Terra reviewed these summaries. Terra decided to contribute to the settlement of the methyl parathion lawsuits. Terra contends that it incurred $1,785,010.34 in defending and settling the methyl parathion lawsuits. Other than defense costs of less than $10,000, $1,785,010.34 is the final computation of defense costs and settlements incurred by Terra in the methyl parathion litigation.

Terra seeks payment for the costs of defending and settling the methyl parathion lawsuits to the extent that amount exceeds $1,000,000. Terra contends that the allegations contained in the methyl parathion lawsuits assert that Terra, as well as other manufacturers and distributors of methyl parathion, allegedly caused bodily injury and property damage by allowing its methyl parathion product to be misused by two persons, Dock Eastman and Paul Walls. Eastman allegedly purchased methyl parathion on twelve occasions between May 25, 1995, and March 9, 1996 and Walls allegedly purchased methyl parathion on six occasions between September 15, 1995 and December 18, 1995.

II. LEGAL ANALYSIS

A. Standards For Summary Judgment

This court has considered in some detail the standards applicable to motions for summary judgment pursuant to Federal Rule of Civil Procedure 56 in a number of prior decisions. *See, e.g., Swanson v. Van Otterloo*, 993 F. Supp. 1224, 1230-31 (N.D. Iowa

1998); *Dirks v. J.C. Robinson Seed Co.*, 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill*, 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); *Rural Water Sys. #1 v. City of Sioux Ctr.*, 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997), *aff'd in pertinent part*, 202 F.3d 1035 (8th Cir. 2000), *cert. denied*, 531 U.S. 820 (2000); *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 817-18 (N.D. Iowa 1997), *aff'd*, 205 F.3d 1347 (8th Cir. 2000) (Table op.); *Security State Bank v. Firstar Bank Milwaukee, N.A.*, 965 F. Supp. 1237, 1239-40 (N.D. Iowa 1997); *Lockhart v. Cedar Rapids Community Sch. Dist.*, 963 F. Supp. 805 (N.D. Iowa 1997). Thus, the court will not consider those standards in detail here. Suffice it to say that Rule 56 itself provides, in pertinent part, as follows:

> Rule 56. Summary Judgment
>
> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motions and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

FED. R. CIV. P. 56(a)-(c) (emphasis added). Applying these standards, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues

for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). As to whether a factual dispute is "material," the Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995); *Hartnagel,* 953 F.2d at 394. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is "entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *Quick*, 90 F.3d at 1377 (same). With these standards in mind, the court turns to consideration of the parties' cross-motions for summary judgment.

B. General Insurance Principles

National Union contends that Terra must exhaust all applicable limits of primary insurance before National Union becomes obligated to pay under the National Union Policy. Terra, on the other hand, asserts that, under the sunrise endorsement, after it pays $1,000,000 then National Union is obligated to pay under the terms of the National Union Policy. Because the issue of National Union's duty to defend and indemnify Terra in the underlying methyl parathion lawsuits requires an analysis of whether the claims in those

lawsuits are covered by the National Union Policy, the court must consider and construe the terms of the National Union Policy pursuant to Iowa law.[1] The Iowa Supreme Court made the following observations regarding the construing of insurance policies:

> An insurance policy is construed as a whole, not by its separate provisions. *Aid Ins. Co. v. United Fire & Casualty Co.*, 445 N.W.2d 767, 770 (Iowa 1989); *Cairns v. Grinnell Mut. Reinsurance Co.*, 398 N.W.2d 821, 825 (Iowa 1987). In construing an insurance policy, the court is permitted to consider the surrounding circumstances, the situation of the parties, and the objects the parties were striving to attain. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 172 (Iowa 1975); *City of Spencer v. Hawkeye Sec. Ins. Co.*, 216 N.W.2d 406, 408 (Iowa 1974). The type of policy obtained and scope of each policy's coverage are evidence of the "objects the parties were striving to attain" which we can consider to determine the priority of these policies. *See Allstate Ins. Co. v. Frank V. Hall & Co.*, 770 P.2d 1342, 1346 (Colo. App. 1989) ("In allocating the priority of the coverage of two separate policies, or in determining which of two policies is primary, a court may consider the 'total policy insuring intent.'").

LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d 216, 218 (Iowa 1992).

The question of whether any term in an insurance policy is ambiguous must be determined by the standards summarized by the Iowa Supreme Court in *Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92 (Iowa 1995):

> The construction and interpretation of an insurance policy is a question of law for the court to decide. *Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203, 206 (Iowa

[1] The parties agree that the court need not make a determination as to a choice of laws in this case because the parties are in agreement that Iowa law is controlling on the issues raised by the parties' cross-motions for partial summary judgment.

> 1995). The policy is to be construed as a whole, giving the words used their ordinary, not technical meaning to achieve a practical and fair interpretation. *Gracey v. Heritage Mut. Ins. Co.*, 518 N.W.2d 372, 373 (Iowa 1994). When the terms of an insurance policy are ambiguous, we will construe them against the insurer. *Id.* However, the mere fact that the parties disagree on the meaning of a particular term does not establish ambiguity. *Id.* We will not give a strained or unnatural reading to the words of the policy to create ambiguity where there is none. *West Trucking Line, Inc. v. Northland Ins. Co.*, 459 N.W.2d 262, 263 (Iowa 1990).

Morgan, 534 N.W.2d at 99. The standards stated in *Morgan* are mirrored in innumerable decisions by Iowa courts. *See, e.g., Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Federated Mut. Ins. Co.*, 596 N.W.2d 546, 550 (Iowa 1999); *LeMars Mut. Ins. Co. v. Joffer*, 574 N.W.2d 303, 306-307 (Iowa 1998); *AMCO Ins. Co. v. Rossman*, 518 N.W.2d 333, 334 (Iowa 1994) (holding that policy terms given ordinary meaning as reasonable person would understand them, and disagreement between parties over meaning does not establish ambiguity); *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 108 (Iowa 1981) (holding that disagreement between parties as to terms meaning does not establish ambiguity); *Pappas v. Bever*, 219 N.W.2d 720, 721 (Iowa 1974) (concluding that terms must be given their plain and ordinary meanings); *Tom Riley Law Firm, P.C. v. Tang*, 521 N.W.2d 758, 759 (Iowa Ct. App. 1994) (disagreement of parties as to meaning does not establish ambiguity and terms must be given their ordinary meaning).

In addition to the standards set out in *Morgan*, a few other points regarding determinations of ambiguities in insurance contracts need to be mentioned. Under Iowa contract law, "'[a]n ambiguity exists if, after the application of pertinent rules of interpretation to the policy words, a genuine uncertainty exists as to which of two or more

meanings is the proper one.'" *Joffer*, 574 N.W.2d at 306 (quoting *Ferguson v. Allied Mut. Ins. Co.*, 512 N.W.2d 296, 298 (Iowa 1994)); *Jensen v. Jefferson County Mut. Ins. Ass'n*, 510 N.W.2d 870, 871 (Iowa 1994) (quoting *Connie's Constr. Co., Inc. v. Fireman's Fund Ins. Co.*, 227 N.W.2d 207, 210 (Iowa 1975)); *Motor Club of Iowa Ins. Co. v. Iowa Mut. Ins. Co.*, 508 N.W.2d 634, 636 (Iowa 1993); *A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am.*, 475 N.W.2d 607, 619 (Iowa 1991); *Iowa Fuel & Minerals v. Board of Regents*, 471 N.W.2d 859, 863 (Iowa 1991); *Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 405 (Iowa Ct. App. 1994); *Tom Riley Law Firm, P.C.*, 521 N.W.2d at 759 (noting that ambiguity exists when a genuine uncertainty exists over two or more meanings of the terms of the contract). The test for ambiguity is an objective one: "Is the language fairly susceptible to two interpretations?" *Joffer*, 574 N.W.2d at 308 (citing *A.Y. McDonald Indus., Inc.*, 475 N.W.2d at 619); *Met-Coil Sys. Corp. v. Columbia Casualty Co.*, 524 N.W.2d 650, 658 (Iowa 1994) (same standard) (citing *North Star Mut. Ins. Co. v. Holty*, 402 N.W.2d 452, 454 (Iowa 1987)); *Cincinnati Ins. Co. v. Hopkins Sporting Goods, Inc.*, 522 N.W.2d 837, 839 (Iowa 1994) (same standard); *Iowa Fuel*, 471 N.W.2d at 863; *North Star Mut. Ins. Co. v. Holty*, 402 N.W.2d 452, 454 (Iowa 1987) (same standard); *Sandbulte*, 302 N.W.2d at 108 (same standard); *see also Farm & City Ins. Co. v. Anderson*, 509 N.W.2d 487, 491 (Iowa 1993) (formulating the test for ambiguity in an insurance policy as "whether a reasonable person would read more than one meaning into the words," citing *Smithway Motor Xpress, Inc. v. Liberty Mut. Ins. Co.*, 484 N.W.2d 192, 194 (Iowa 1992)).

It is a "fundamental rule" for interpreting insurance policies that when the meaning of a term in an insurance policy is ambiguous, it must be construed in the light most favorable to the insured. *Cincinnati Ins. Co.*, 522 N.W.2d at 839; *AMCO Ins. Co.*, 518 N.W.2d at 334 ("When the meaning of terms of an insurance policy is susceptible to two

interpretations, the one favoring the insured is adopted."); *Jensen*, 510 N.W.2d at 871; *A.Y. McDonald Indus., Inc.*, 475 N.W.2d at 619; *North Star Mut. Ins. Co.*, 402 N.W.2d at 454; *Rich v. Dyna Technology, Inc.*, 204 N.W.2d 867, 872 (Iowa 1973) ("Where insurance contracts are ambiguous, require interpretation, or are susceptible to equally proper constructions, the court will adopt the construction most favorable to the insured."); *The Travelers v. Mays*, 434 N.W.2d 133, 134 (Iowa Ct. App. 1988) (quoting *Rich*). The reason underlying this rule is that insurance contracts are contracts of adhesion. *Joffer*, 574 N.W.2d at 306; *Cincinnati Ins. Co.*, 522 N.W.2d at 839; *Jensen*, 510 N.W.2d at 871; *A.Y. McDonald Indus., Inc.*, 475 N.W.2d at 619. Again, however, this rule applies only when the terms of the policy are ambiguous or unclear. *Joffer*, 574 N.W.2d at 307; *Farm & City Ins. Co.*, 509 N.W.2d at 490-91.

When interpreting insurance policies, a court must "'seek to ascertain from its words the intent of the insurer and insured at the time the policy was sold.'" *Jensen*, 510 N.W.2d at 871 (quoting *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988).[2]

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[2] Under Iowa law, the court, not the jury, has the duty to construe contracts. *AMCO Ins. Co. v. Rossman*, 518 N.W.2d 333, 334 (Iowa 1994); *Jensen*, 510 N.W.2d at 871; *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). Although interpreting the meaning of words in an insurance policy is most often an issue of law for the court to decide, the interpretation becomes a question of fact where the interpretation depends on "extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence." *Jensen*, 510 N.W.2d at 871;*Voeltz*, 431 N.W.2d at 785. Extrinsic evidence refers to evidence other than the words of the policy. *Jensen*, 510 N.W.2d at 871; *Voeltz*, 431 N.W.2d at 785. Although the parties may disagree on the meaning of a term, that does not establish that the term is ambiguous so as to cause an interpretation of the contract against the maker. *AMCO Ins. Co.*, 518 N.W.2d at 334.

C. Coverage Under The National Union Policy

It is uncontested that the National Union Policy is an excess or umbrella policy. "True excess and umbrella policies require the existence of a primary policy as a condition of coverage." *National Sur. Corp. v. Ranger Ins. Co.*, 260 F.3d 881, (8th Cir. 2001). An excess or umbrella policy's express purpose "'is to protect the insured in the event of a catastrophic loss in which liability exceeds the available primary coverage.'" *Id.* (quoting 15 RUSS & SEGALLA, COUCH ON INSURANCE, § 220:32, at 220-37 (3d ed. 1999)). The Supreme Court of Iowa has held that an insurer that issued an excess or umbrella policy is not liable for any portion of the loss until the primary insurer's policy limit has been exhausted. *See Vigilant Ins. Co. v. Allied Prop. & Cas. Ins. Co.*, 609 N.W.2d 538, 541 (Iowa 2000); *LeMars Mut. Ins. Co.*, 494 N.W.2d at 219.

The National Union Policy provides the following coverage:

> We will pay on behalf of the **Insured** those sums in excess of the Retained Limit that the **Insured** becomes legally obligated to pay by reason of liability imposed by law or assumed by the **Insured** under an **Insured Contract** because of **Bodily Injury, Property Damage, Personal Injury** or **Advertising Injury** that takes place during the Policy Period and is caused by an **Occurrence** happening anywhere in the world. The amount we will pay for damages is limited as described in Insuring Agreement III, Limits of Insurance.

National Union's App. In Support Of Motion For Summary Judgment at 224. Thus, under the terms of the National Union Policy, National Union is required to pay its insured Terra, "those sums in excess of the Retained Limit" that Terra becomes legally obligated to pay. The National Union Policy defines "Retained Limit" as follows: the greater of either

> 1. The total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance and the

applicable limits of any other underlying insurance providing coverage to the **Insured**; or

2. The amount stated in the Declarations as Self Insured Retention as a result of any one **Occurrence** not covered by the underlying policies listed in the Schedule of Underlying Insurance nor by any other underlying insurance providing coverage to the **Insured**;

National Union's App. In Support Of Motion For Summary Judgment at 226.

Terra argues that the sunrise endorsement provides for "special 'underlying coverages and limits' for claims, such as these, that involve an occurrence happening between January 1, 1985 and July 1, 1997, the time period in which Terra purchased 'claims-made' umbrella coverage that would expire at the effective date of the National Union policy at issue." Terra's Memorandum in Support of Plaintiff's Motion for Summary Judgment at 2. Although the issue is an exceedingly close question and one which does not appear to have been the subject of any prior decisions, the court finds that the language of the National Union Policy and its sunrise endorsement supports Terra's argument regarding construction of the sunrise endorsement. The sunrise endorsement states explicitly that: "*Solely* as respects the coverage afforded by this contract the following underlying coverages and limits (known herein as the Schedule of Underlying Insurance) apply. It is understood that these limits are unimpaired." Terra's App. at A-019 (emphasis added) Thus, the sunrise endorsement contains a separate and distinct schedule of coverages and limits from that found in the main body of the National Union Policy. Moreover, the sunrise endorsement's underlying limit of insurance is defined in a different method than that found in the text of the National Union Policy. In the sunrise endorsement the underlying insurance is defined as a specific definite number while in the main text of the National Union Policy it is tied to the amounts found in listed policies.

The Iowa Supreme Court has held that an insurance policy and endorsements should be construed, if possible, so as to give effect to all provisions, but, where provisions in the body of the policy conflict with an endorsement, the provision of the endorsement governs. *Motor Vehicle Cas. Co. v. LeMars Mut. Ins. Co.*, 254 Iowa 68, 116 N.W.2d 434, 436 (1962). Here, because the National Union Policy and the sunrise endorsement are in conflict with respect to what constitutes the underlying coverages and limits, the coverages and limits listed in the sunrise endorsement are controlling. *Id.*

This conclusion, however, results in the creation of an ambiguity in the terms of what constitutes a "retained limit" under the terms of the National Union Policy. While the National Union Policy defines retained limit in terms of "the total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance and the applicable limits of any other underlying insurance providing coverage to the **Insured,**" this definition cannot be reconciled with the sunrise endorsement's listing of specific limits and coverages. Moreover, the sunrise endorsement states explicitly that the listed limits are "unimpaired." This language indicates that the amounts listed in the sunrise endorsement were to be met by Terra as a condition for coverage irrespective of prior claims and coverages. Thus, the court concludes that an ambiguity has been created with respect to whether the retained limit provision has been supplanted by the terms of the sunrise endorsement. Because the retained limit term is rendered ambiguous by the language of the sunrise endorsement, it must be construed in the light most favorable to Terra. *Cincinnati Ins. Co.*, 522 N.W.2d at 839; *AMCO Ins. Co.*, 518 N.W.2d at 334; *Jensen*, 510 N.W.2d at 871; *A.Y. McDonald Indus., Inc.*, 475 N.W.2d at 619; *North Star Mut. Ins. Co.*, 402 N.W.2d at 454. So construed, Terra is entitled to coverage from National Union for defense costs and settlement payments after the first $1,000,000 of losses related to an occurrence. Here, the court concludes that because Terra's claimed

loss, $1,785,010.34, exceeds the applicable $1,000,000 limit required by the National Union Policy, there is coverage available to Terra under the terms of the National Union Policy. The court therefore grants Terra's motion for summary judgment and denies National Union's motion for summary judgment.

III. CONCLUSION

The court finds that Terra's claimed loss does exceed the applicable limits required by the National Union Policy. Therefore, the court concludes that there is coverage available to Terra under the terms of the National Union Policy. The court therefore **grants** Terra's motion for summary judgment and **denies** National Union's motion for summary judgment. The court declares and orders that National Union reimburse Terra in the amount of $785,010.34 for the costs of the methyl parathion lawsuits through June 23, 2003. The court further orders National Union to reimburse Terra for any additional reasonable attorney's fees and expenses of the methyl parathion lawsuits as those costs are subsequently incurred. Judgment shall enter accordingly.

IT IS SO ORDERED.

DATED this 27th day of August, 2003.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA